

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
MENDENHALL-RAINES)	
PROPERTY, LLC)	
)	
)	
)	
RESPONDENT)	CASE NO. WPC07-0171

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Mendenhall-Raines Property, LLC (hereinafter "The Respondent") is the owner and developer of approximately 17 acres located at 4721 S. Mendenhall Road in Shelby County, Tennessee (hereinafter the "site"). Service of process may be made on the

Respondent through its registered agent, John Behnke, at 3590 Sky Harbor Drive, Memphis, Tennessee 38118.

JURISDICTION

IV.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

VI.

Johns Creek is referred to herein as “waters of the state,” as defined in T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, “Use Classifications For Surface Waters,” is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, Johns Creek has been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. Additionally, Johns Creek is listed as impaired for loss of biological integrity due to siltation, *Escherichia coli* resulting from collection system failures, and phosphate discharged from an MS4 area.

VIII.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

FACTS

IX.

On July 6, 2007, division personnel conducted an inspection at the site and discovered that unauthorized land disturbance activities were underway. The site is directly adjacent to Johns Creek, which is listed as impaired for biological integrity due to siltation. The Erosion Prevention and Sediment Control (EPSC) measures were inadequate and improperly maintained, allowing sediment to migrate off-site and enter Johns Creek, resulting in a condition of pollution. An outfall, a channel cut directly into Johns Creek, had been constructed to drain sediment-laden stormwater from the site. Division personnel observed construction debris and large soil deposits piled on the bank of Johns Creek. Upstream of the site division personnel observed clear flowing water, but adjacent to the site and immediately downstream the negative impact was evident by the stream discoloration caused by sediment entering the stream from the site.

X.

On July 12, 2007, the division issued a Notice of Violation (NOV) to the Respondent for the violations observed during the July 6, 2007, site visit. The NOV requested submission of a NOI, SWPPP, site map, and application fee by July 30, 2007. To date the respondent has failed to submit the required documentation to obtain permit coverage.

VIOLATIONS

XI.

By physically altering waters of the state without authorization under an ARAP, and by conducting construction activities without authorization under the TNCGP, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
 - (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
 - (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued

pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

XII.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), referenced below, and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following Order and Assessment to the Respondent:

1. The Respondent shall, immediately, establish and maintain effective EPSC measures on-site to ensure that sediment is not allowed to leave the site or enter waters of the state. These EPSC measures shall be maintained until such time as all land disturbance at the site is complete and erosion-preventive permanent cover is established. The Respondent shall, within FOURTEEN (14) days of receipt of this Order, submit written documentation and photographic evidence indicating that appropriate EPSC measures are in place. The Respondent shall

submit this written documentation and photographic evidence to the Water Pollution Control manager in the Memphis-Environmental Field Office (M-EFO) at Suite E-645 Perimeter Park, 2510 Mount Moriah Road, Memphis, Tennessee 38115-1520 and shall submit a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within FOURTEEN (14) DAYS of receipt of this Order and Assessment, submit for division approval a corrective action plan for the removal of sediment accumulations, from the impacted portions of Johns Creek. The plan shall include, but not be limited to, the methods to be used during sediment removal activities and a schedule of implementation for the proposed activities. The plan shall be submitted to the division's manager at the M-EFO located at the address referenced above. A copy shall also be submitted to the manager of the division's Enforcement and Compliance Section (E&C) located at the address given above.
3. The Respondent shall, within THIRTY (30) DAYS of division approval, complete the activities outlined in the approved corrective action plan and notify the manager of the division's M-EFO upon completion.
4. The Respondents shall, within 14 days of receipt of this Order, submit a NOI, SWPPP and the appropriate application fee for all remaining construction activities at the site. These documents and the application fee should be submitted to the Water Pollution Control Manager at the M-EFO as shown in Item 1, above.

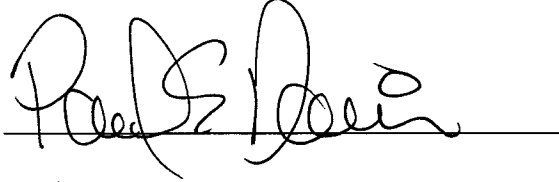
5. The Respondent shall, within six months of receipt of this Order and Assessment, attend a Fundamentals of Erosion and Sediment Control Workshop provided by the Tennessee Department of Environment and Conservation, and submit documentation of successful completion to the division manager at the M-EFO and a copy to the manager of the E&C Section, at the respective addresses above. The Respondent should obtain certification for all supervisory personnel who are expected to be responsible for land disturbance activities or erosion prevention and sediment control at the site. Information may be found on the program website at <http://www.tnepsc.org/>.
6. The Respondent is hereby assessed a CIVIL PENALTY in the amount of FORTY TWO THOUSAND FIVE HUNDRED DOLLARS (\$ 42,500.00).
 - a. The Respondent shall pay TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
 - c. The Respondent shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
 - d. The Respondent shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.

- e. The Respondent shall pay THREE THOUSAND DOLLARS (\$3,000.00) within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 4 above in a timely manner.
 - f. The Respondent shall pay THREE THOUSAND DOLLARS (\$3,000.00) within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 5 above in a timely manner.
7. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future. The director may, for good cause shown by the Respondent, extend for a fixed time period, the compliance dates contained within this Order.

To be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay. The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on behalf of the
Commissioner of the Tennessee Department of Environment and Conservation on this
24th day of August, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

T.C.A. §§69-3-109 and 69-3-115, allows the Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondents must file with the Office of General Counsel, located at 401 Church Street, L&C Tower 20th Floor, Nashville, Tennessee 37243, a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low- income individuals may be eligible

for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution and Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. Please write your case number on all payments and all correspondence concerning this matter.